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Issue Date: 30 June 2003

Case No. 2003-STA-1

In the Matter of:

CHARLES W. FELTNER,
Complainant,

v.

CENTURY TRUCKING, LTD.
Respondent.

Case No. 2003-STA-2

In the Matter of:

CHARLES W. FELTNER,
Complainant,

v.

MAINLINE ROAD AND BRIDGE CONSTRUCTION, INC.
Respondent.

APPEARANCES:

Charles W. Feltner
Pro Se

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Dayton, Ohio
For the Respondent, Century Trucking, Ltd.

James Kordik, Esq.
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Dayton, Ohio
For the Respondent, Mainline Road
and Bridge Construction, Inc.

BEFORE: DANIEL J. ROKETENETZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

These cases, which have been consolidated for the purpose of judicial economy, arise under the Surface Transportation Assistance Act of 1982 [hereinafter referred to as "the Act" or "STAA"], 49 U.S.C. § 2305, and the regulations promulgated thereunder at 29 C.F.R. Part 1978. Section 405 of the STAA provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would be in violation of those rules.

The Complainant, Charles W. Feltner, filed a complaint with the Occupational Safety and Health Administration, United States Department of Labor, on August 14, 2002, alleging that the Respondent, Century Trucking [hereinafter referred to as "Century"] who was a subcontractor to Respondent, Mainline Road and Bridge Construction [hereinafter referred to as "Mainline"], discriminated against him in violation of 49 U.S.C. §31105. The Secretary of Labor, acting through a duly authorized agent, investigated the complaint and, on September 11, 2002, determined that the Complainant failed to establish an employer/employee relationship between himself and Mainline. Furthermore, on September 12, 2002, the Secretary of Labor found that although the Complainant is covered under the Act, there was no reasonable cause to believe that Century violated 49 U.S.C. §31105.

The Complainant filed objections to the Secretary's findings by way of a letter dated September 30, 2002. A formal hearing was held before the undersigned on March 25, 2003, in Dayton, Ohio. All parties were afforded full opportunity to present evidence as provided in the Act and the regulations issued thereunder.

The findings of fact and conclusions of law set forth in this Decision and Order are based on my analysis of the entire record. Each exhibit and argument of the parties, although perhaps not mentioned specifically, has been carefully reviewed and thoughtfully considered. References to C-ALJX. 1 through 19, M-ALJX. 1 through 19, CX. 1 through 3, MX. 1 through 2, and CX 1 through 2 pertain to the exhibits admitted into the record and offered by the Administrative Law Judge in both claims against Century and Mainline, Century Trucking, Mainline Road and Bridge and the Complainant, respectively. The Transcript of the hearing is cited as Tr. followed by page number.

ISSUES

The issues in both cases are:

1. Whether Mr. Feltner was an employee of either Century or Mainline, and therefore entitled to protection under STAA; and,
2. If Mr. Feltner is covered by STAA, whether Century or Mainline, individually or collectively, took adverse action against him in retaliation for his alleged protected activities.

Based on my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background:

Mr. Feltner alleges that he was terminated from employment with Century and Mainline because of safety complaints he made both internally to the companies and to the Occupational Safety and Health Administration ("OSHA"). He alleges that Dean Moore, an employee of Mainline, would routinely overload his dump truck. (TR 19) He testified that on August 12, 2002, he was hauling loads of dirt and dirt clods fell off the truck. (TR 74) The following morning, August 13, 2002, he told Tony Cochran, a dozer operator, that he would call the OSHA if they continued to overload his truck. Mr. Feltner testified that Mr. Cochran told Mr. Moore that Mr. Feltner had threatened to call OSHA. According to Mr. Feltner, Mr. Moore then approached him and told him he would be fired for thinking about calling OSHA. (TR 74) He testified that Mr. Donofrio, the foreman, approached him and stated that he could work that day but would not be working any longer for Mainline. Mr. Feltner testified that he called OSHA between 9:00 and 9:30 that morning to report that his truck had been overloaded. (TR 75)

Later that day, Mr. Feltner had a conversation with Jim Miniard, an employee of Century and the husband of Century's owner, Theresa Miniard. According to Mr. Feltner's testimony, Mr. Miniard asked why he had called OSHA. Mr. Feltner related the overloading situation he was having and asked if he was going to go back to the job the next day. Mr. Miniard "hollered and asked Teresa what did

Tony say - he said he don't want Chuckie on the job no more." (TR 78) Mr. Miniard then asked Mr. Feltner if he could haul another load of gravel. Mr. Feltner told him he was unable to do so because his tailgate leaked.

Mr. Feltner testified that he called Century on the night of August 13th, and asked Mr. Miniard where he stood with Century. He testified that Mr. Miniard hung up on him. Mr. Feltner did not call Century again, nor did Century call Mr. Feltner in regard to his employment.

Coverage by the STAA:

STAA section 405(a) provides that no person shall discharge any "employee" because such "employee" has filed any complaint relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order.

An "employee" is defined by the STAA as a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight handler, or an individual who is not an employer, who directly affects commercial vehicle safety in the course of employment by a commercial motor vehicle carrier. 49 U.S.C. § 31101(2).

1. Century Trucking

In order for the STAA to apply, Mr. Feltner must establish that he was at all times an employee of Century Trucking under the regulations. I find that this requirement has been met. Century Trucking hired Mr. Feltner as an independent contractor to drive a truck with a gross vehicle weight exceeding 10,000 lbs, and in the course of his employment he directly participated in interstate commerce and directly affected commercial vehicle safety. Since Mr. Feltner was personally driving the vehicle, Mr. Feltner is considered an "employee" despite his status as an independent contractor.

2. Mainline Road and Bridge

Mainline Road and Bridge is the prime contractor for the road reconstruction project. Century is a subcontractor of Mainline. There is no contract between Mr. Feltner and Mainline. It is Mainline's contention that Mr. Feltner was neither an employee nor an independent contractor of Mainline.

The testimony of other employees is helpful in examining the relationship between Mainline and Century. Anthony Donofrio, the

superintendent for Mainline, testified that Mainline contracted with Century to provide trucks and drivers. Mr. Donofrio testified that he would talk to Century on a daily basis to request the needed number of trucks and drivers for the next day. Mainline exercised control over Mr. Feltner's day-to-day work assignment, as evidenced by Mr. Donofrio's testimony that he assigned Mr. Feltner to other duties when he refused to work if overloaded again. Mr. Donofrio also asked Mr. Feltner to haul gravel on the afternoon of the August 13, 2002. Additionally, Mr. Donofrio requested of Century that Mr. Feltner not be sent back to the project following the incidents of August 13, 2002. Accordingly, the record establishes the requisite degree of control over Mr. Feltner, through the day-to-day assignment of services and the authority to reject Mr. Feltner's services. As such, I find that Mainline acted as a joint-employer of Mr. Feltner. (TR 27-30)

Testimonial Evidence and Credibility Findings:

I have carefully considered and evaluated the rationality and internal consistency of the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative, and available evidence - analyzing and assessing its cumulative impact on the record. See, e.g., Frady v. Tennessee Valley Auth., 92-ERA-19 at 4 (Sec'y Oct. 23, 1995)(citing Dobrowolsky v. Califano, 606 F.2d 403, 409-10 (3d Cir. 1979)); Indiana Metal Prod. v. Nat'l Labor Relations Bd., 442 F.2d 46, 52 (7th Cir. 1971).

Credibility is that quality in a witness which renders his or her evidence worthy of belief. For evidence to be worthy of credit,

[it] must not only proceed from a credible source, but must, in addition, be 'credible' in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe it.

Indiana Metal Prod., 442 F.2d at 51.

An administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. See Altemose Constr. Co. v. Nat'l Labor Relations Bd., 514 F.2d 8, 15 n.5 (3d Cir. 1975).

Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior and outward

bearing of the witnesses from which impressions were garnered as to their demeanor. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and the demeanor of witnesses.

The transcript of the hearing in this case is comprised of the testimony of seven witnesses: Tony Cochran, Dean Moore, Tony Donofrio, Jim Miniard, Mike Greer, Teresa Miniard, and Charles Feltner. The events which Mr. Feltner allege led to his termination occurred on a road reconstruction project on James H. McGee Avenue in Dayton, Ohio. (Tr. 15)

1. Tony Cochran

Mr. Cochran worked as a dozer operator for Mainline Road and Bridge. He testified that on the morning of August 13, 2002, Mr. Feltner told him that Dean Moore, the loading operator for Mainline, had overloaded his truck and that "they were not going to treat [Complainant] this way, that they were not going to misuse his truck and him anymore." (TR 12) Mr. Cochran also stated that Mr. Feltner told him that if they started to overload his truck again that he would call OSHA. Mr. Cochran then told Mr. Moore that Mr. Feltner had a problem concerning the overloading of his truck that they should discuss.

Mr. Cochran testified that he believed Mr. Feltner to be employed by Century Trucking. He also stated that he has no personal knowledge as to whether or not the truck was being overloaded and that there was no scale on the job site.

I find the testimony of Mr. Cochran to be credible. Mr. Cochran was forthright in his answers and presented no indicia of dishonesty.

2. Dean Moore

Mr. Moore worked for Mainline as a loader operator for the road reconstruction on James McGee. (TR 18-19) He testified that he confronted Mr. Feltner on August 13, 2002, after being told by Tony Cochran that Mr. Feltner was upset. Mr. Moore testified that he said "I hear you have a problem with me." According to Mr. Moore, Mr. Feltner responded that he "had already called OSHA and if one more spec of dirt fell in that road when he went and dumped it, that he was to call them and they would be right back out there." (TR 17) Mr. Moore then told Mr. Feltner that he would not load him and work under the stress that he was creating. Mr. Moore

testified that he also called Tony Donofrio and informed him of the situation. Mr. Moore denied ever stating that Mr. Feltner was or would be fired, only that he would not load Mr. Feltner because he was creating a safety problem for him. (TR 18)

Mr. Moore further testified that on the morning of August 13th, 2002, he was loading Mr. Feltner's truck in a similar manner that he had done on August 12th and had not received any prior complaints. (TR 19) He testified that he normally puts four buckets in the trucks, or roughly twelve tons.¹ He stated that occasionally he may put in five if he had not gotten full buckets. (TR 20) Mr. Moore testified that four buckets would not fill Mr. Feltner's truck. He stated that the load may rise above the sides of the truck, however that would only occur in the center of the bed. (TR 21) He testified that there would be a five foot distance from the cone in the center of the bed to the sides of the bed. Mr. Moore could not recall any instance where he loaded the truck so that materials would fall off the truck. (TR 22) He also testified that the drivers would drive the load approximately one mile to one and a half mile away before dumping it. (TR 24)

I find the testimony of Mr. Moore to be credible. Mr. Moore appeared forthright, honest, and knowledgeable regarding his loading practices.

3. Tony Donofrio

Mr. Donofrio is the superintendent for Mainline who was in charge of the James McGee project on August 13, 2002. (TR 25) He testified that he got a phone call from Dean Moore before 7:00 a.m. stating that there was a problem and that he should come to the site. When he arrived at the site, Mr. Moore met him and said that he should meet with Mr. Feltner because there was a problem. (TR 25) Mr. Donofrio testified to meeting with Mr. Feltner, who told him that he had already called OSHA and that if he was overloaded again that he would call OSHA again. Mr. Donofrio asked Mr. Feltner if he had already called OSHA and Mr. Feltner stated "That's right, I have." (TR 26) Subsequently, Mr. Moore told Mr. Donofrio that he wasn't going to load Mr. Feltner again. Mr. Donofrio then told Mr. Feltner to work down on the other end of the job at another project until he could figure out what to do with the situation. (TR 26)

¹Mr. Feltner stated that his truck had a legal load capacity of 15 tons. (Tr. 23)

Mr. Donofrio denies telling Mr. Feltner that he was fired and would not work for Mainline again if he called OSHA. (TR 26) He also testified that Mr. Feltner is not an employee of Mainline and has no contract with Mainline. According to Mr. Donofrio, Mainline would call Century and request the number of trucks that they would need for a given day, but Century was just one of others that Mainline would call for trucks. (TR 27)

Mr. Donofrio testified that Mr. Feltner continued to work nearly the entire day at the alternate job site. (TR 31) He asked Mr. Feltner to do one more project at the end of the day, but after Mr. Feltner refused to do so Mr. Donofrio signed his ticket indicating the end of the work day. (TR 28) Mr. Donofrio testified to the following conversation at the end of the day:

At the end of the day, he had finished - well, I had moved him up to the job and he had finished that project, so he said what do you want me to do now and I said I need you to go to the gravel pit and get a load of gravel and he said I am not going. I said, well you may as well give me your ticket now. So he says so, I am fired, right? And I said, no, I can't fire you. He said, so I am fired. He said it three times. I said, Chuckie, I know exactly what you are doing. I said, I can't fire you, you don't work for me. So I signed his ticket and that was it.

(TR 28)

Mr. Feltner alleges that he was unable to haul when asked to do so because of the damage done to his tailgate. Mr. Donofrio testified that Mr. Feltner had used the truck all day and that he did not recall being informed of the damage to his truck. (TR 32)

Mr. Donofrio also testified as to the relationship between Mainline and Century. He testified that he spoke to Mainline usually once a day in order to set up trucks for the next day. (TR 29) Century then dispatched the trucks. On the night of August 13, 2002, Mr. Donofrio called Teresa Miniard, owner of Century, to let her know how many trucks would be needed for the 14th. During that conversation, Mr. Donofrio testified that he told Ms. Miniard that Mr. Feltner had a problem with Mainline and that he would prefer if he was not sent back to the project. (TR 29-30)

Mr. Donofrio appeared forthright and honest in his answers. Accordingly, I find his testimony to be credible.

4. Jim Miniard

Mr. Miniard is an estimator for Century Trucking and the spouse of Teresa Miniard, owner of Century. (TR 34, 39) He testified that Mr. Feltner came over to his house at around 3:00 p.m. on August 13, 2002, to fix a bent pin in his truck. (TR 35) He testified that he straightened the pin and Mr. Feltner seemed satisfied that the problem was corrected and he went back to work. (TR 39) Upon being shown pictures of the truck, Mr. Miniard admitted that even after the repair of the pin that the tailgate needed to be adjusted. He testified that the pictures showed a gap in the tail gate that could be fixed in an hour using a turnbuckle. (TR 38)

Mr. Miniard also testified that Mr. Feltner complained that he thought he was being overloaded. Mr. Feltner did not tell Mr. Miniard about any phone call or plan to call OSHA. (TR 43) Mr. Miniard testified that he suggested to Mr. Feltner that he find a set of scales and get a weigh slip. He stated that the company would pay whatever the cost for getting the truck weighed if the driver turned the weigh slip in with his bills. (TR 44) He testified that Mr. Feltner never turned in a weigh slip.

Mr. Miniard agreed to go to the work site to check it out. (TR 40) He testified that he spoke to all the other truck drivers at the site and that they said they were satisfied with how things were going and did not feel that they were being overloaded. (TR 41) He also talked to an unidentified woman on a dozer who worked for Mainline. The woman told him that there were no problems as far as getting in and out and dumping. (TR 43) Furthermore, Mr. Miniard testified that he looked at the trucks and that they all appeared within reason. He stated that the drivers leased their trucks to Century but that the lease was not exclusive as the drivers were able to work for anyone they wanted to. (TR 42)

I find the testimony of Mr. Miniard to be honest, forthright, and credible.

5. Mike Greer

Mr. Greer is part-owner of Associated Excavating, a company that has used Mr. Feltner on occasion. Mr. Greer testified that he called Mr. Feltner for work on August 16, 2002. (TR 46) Mr. Greer had no recollection of the gap in Mr. Feltner's tailgate or of Mr. Feltner having to constantly push the tailgate closed. (TR 45-46) He did recall asking Mr. Feltner if he was still working for Century for purposes of billing and Mr. Feltner responded that he was on his own. (TR 47) Mr. Greer could not recall Mr. Feltner

telling him that he had called OSHA, only that he said he had a problem with Mainline. (TR 47) He testified that his mother, who worked in Associated Excavating's office, was told by Century that Mr. Feltner was not working for Century because of a problem with OSHA and Mainline. (TR 48) Mr. Greer stated that this information did not make any difference to him other than he needed a certificate of insurance for Mr. Feltner to continue working. (TR 48) Mr. Feltner worked a full day on August 16th plus a few of the following days and he provided a certificate of insurance shortly thereafter.

Mr. Greer also testified that it is not an uncommon occurrence that tailgates get misaligned. He stated that it can happen during loading or unloading and that "in general, that happens." Mr. Greer reiterated that he does not recall having to push the gate down on the 16th, however he noted that it could have happened, it just did not stand out in any way. (TR 50-51)

I found Mr. Greer to be straight-forward and honest. As such, I find his testimony to be credible.

6. Teresa Miniard

Ms. Miniard is the owner of Century Trucking. She testified that on the morning of August 13, 2002, she received a phone call saying that Mr. Feltner was arguing with one of Mainline's operators. She believed that it could have been one of her drivers, but that she could not recall. The phone call came from a Century driver named Dave. She called Mr. Feltner and then went to the job site. She stated that Mr. Feltner would not get out of his truck to talk to her. (TR 53) Ms. Miniard did talk to Dave who told her that he had seen Mr. Feltner get out of his truck and approach Mr. Moore on his track hoe and that they were arguing. At that point, Ms. Miniard went to the other work site where Mr. Feltner had begun working and questioned him as to what was going on. Mr. Feltner responded that he was sick of them overloading his truck and that he was calling OSHA. (TR 61)

In the evening, Ms. Miniard received a call from Mr. Donofrio. Mr. Donofrio told her that he wanted four or five trucks for the next day but that he would prefer if Mr. Feltner was not sent back because Mr. Feltner refused to haul a load of gravel for him and he was paying him by the hour. (TR 56) She testified that at that time she only had two jobs, both with Mainline. Ms. Miniard agreed and did not send Mr. Feltner out. She also testified that normally the drivers would call her by 5:00 p.m. to ask about referrals for the next day but that Mr. Feltner never called her. (TR 63) She called Mr. Feltner only once following the incident to tell him that she

had his check. Ms. Miniard testified that she never told Mr. Feltner that he was fired or that she was terminating the lease agreement with him. (TR 65)

She further testified that Mr. Feltner was an independent contractor and that she supplied Mr. Feltner as a trucker to Mainline on August 12th and 13th. She testified that she has the authority to terminate Mr. Feltner's contract for trucking services. The agreement states she is to receive \$2.00 an hour for referring the trucks out to a job. They do not have to work for her, however she can tell a particular trucker not to go to a job site. (TR 55)

Ms. Miniard testified that she saw that Mr. Feltner was working for Associated Excavating during the same week that Mr. Donofrio asked her not to put him back out with Mainline. She called Associated Excavating to inform them that Mr. Feltner was no longer covered by her insurance. (TR 57-58) She testified that she did not tell Associated Excavating that they should not hire Mr. Feltner or that Mr. Feltner had called OSHA. (TR 58) She testified that Mr. Feltner did not complain to her about any damage to the back of his truck. (TR 66)

I find the testimony of Ms. Miniard to be credible. She offered full and honest answers under examination.

7. Charles Feltner

Mr. Feltner contends that he was fired from his employment unlawfully by the Respondents. He stated that on August 12, 2002, he was driving his truck and dirt clods fell off his truck onto the street. (TR 74) He testified that on the 12th he "walked up to Dean Moore and I said you are loading us kind of heavy, aren't you? He said, no, loading everybody with five buckets. Well, I didn't make no big scene. I just let it go because I didn't have my tape recorder that day." (TR 88)

Mr. Feltner further testified that on the morning of August 13, 2002, he told Mr. Cochran that he would call OSHA if he was overloaded again. Mr. Cochran then reported this conversation to Mr. Moore, who approached Mr. Feltner and allegedly told Mr. Feltner that "he might want to load me and I'm fired for thinking about calling OSHA." (TR 74) Mr. Feltner testified that Tony Donofrio, the foreman for Mainline, then approached him and told him that he could work that day but would not be working for Mainline any longer. Ms. Miniard arrived at the work site sometime around 9:00. He had not called OSHA at that point; however, he testified, "I said I called OSHA. I said it's against the law to

fire you if you call OSHA." (TR 81) After this conversation, at around 9:30 a.m., Mr. Feltner then called OSHA to file his complaint. He stated that he talked to a woman at OSHA for about 10 to 15 minutes. (TR 74-75, 77) When asked about the statements he made before 9:30 that he had called OSHA, Mr. Feltner stated that what he had meant is that he had talked to OSHA a few years ago. (TR 88)

Mr. Feltner never weighed his truck to determine if there was an actual safety violation. He stated that there were no scales around to weigh them on. (TR 89) He testified that his truck could legally hold 15 tons and he was not aware of how much each of the scoops weighed. In describing why he thought he was overloaded, Mr. Feltner stated that he could tell when he was driving because the truck would sway. He testified that he went a half mile down the road on public roads. He further stated that when overloaded he was concerned that a dirt clod may fall off the truck and that "them black boys would shoot me if one of them dirt clods hit them. It's not up in a good part of Dayton... That was my only safety concern. Long as them black boys leave me alone, I was fine." (TR 91)

Mr. Feltner testified that he went to the other job site down the street and that they put big pieces of concrete in the truck which knocked his tailgate off. He continued to work but he required assistance to latch his tailgate since it no longer shut all the way. (TR 77) He testified that he worked three-fourths of the day and then went to Century Trucking because they had a torch which he could use to heat up the bent pin on his tailgate. There he met with Jim Miniard. "He [Miniard] asked me why I called OSHA that day. I said, well they was overloading my truck and I just told them not to overload me, so I called OSHA. I asked him was I going back on the job the next day and he said no." (TR 78)

Mr. Feltner then went to get his ticket signed. He was asked to haul another load of gravel but refused because his tailgate still leaked and would only close with if it was pushed by a back hoe. Mr. Feltner testified to operating it for at least ten days before fixing it. (TR 80) He testified that the repairs cost him \$119.00.

Mr. Feltner testified that he called Mr. Miniard on the night of August 13, 2002. "I said, Jimmy, where does me and you stand, we still good or are you going to go with Mainline. He said don't call me no more and hung the phone up. So I knew right then that there wasn't no work." (TR 82) Upon questioning, Mr. Feltner admitted that he was only told that he would not be working that specific job and that he did not call the next day as was customary

to ask for work at other sites. (TR 97) He stated, however, that it was his usual practice to ask about work the day before. (TR 81)

Mr. Feltner testified that two days later Mr. Greer called and that he went back to work, despite the gap in his tailgate. (TR 83) Mr. Feltner also testified that he is not working currently and his truck is parked because he can't work his truck, though he can drive somebody else's truck if they hire him. (TR 84) He stated that he would not get hired because "everybody says they don't want you on that job, you called OSHA." (TR 85) Mr. Feltner contends that JP Martin Trucking told him this and also said that he had a bad reputation around Dayton for calling OSHA. (TR 85)

I did not find Mr. Feltner especially credible. Mr. Feltner made inconsistent statements on the morning of August 13, 2002, regarding his phone call to OSHA. At 9:00a.m., Mr. Feltner testified that he told Ms. Miniard that he had already called OSHA. This is refuted by Mr. Feltner's own testimony that he filed his Complaint with OSHA at 9:30a.m., following his conversation with Ms. Miniard. When asked to explain this inconsistency, Mr. Feltner testified that he was referring to the fact that he had called OSHA a few years earlier. However, I find this explanation disingenuous.

I also have doubts regarding Mr. Feltner's credibility in that he appears to have entered this situation with an inclination toward litigation. For example, rather than asking Mr. Moore to load him with less on August 12th, Mr. Feltner waited until the following morning "because [he] didn't have [his] tape recorder that day." He also appeared to behave in a confrontational manner towards Mr. Moore and Ms. Miniard. This was evidenced by both his behavior on the stand and his recounenance of events relevant to this case.

Mr. Feltner also testified at length regarding the damage to his tailgate. This incident appears to have angered him and he feels that the Respondents are in some way liable. It is obvious that he possesses strong feelings toward the Respondents as a result of the damage to his truck and his perceived damage to his reputation. As such, I question his objectivity in dealing with the relevant events surrounding his contentions.

Based on these reasons, when appropriate, I grant less probative weight to Complainant's allegations of fact as contradicted by more credible, probative testimony.

Applicable Law:

Section 405 of the STAA provides:

(a)(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because -

(A) the employee, or another person at the employee's request, has filed any complaint or begun a proceeding relating to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or

(B) the employee refuses to operate a vehicle because -

(i) the operation violates a regulation, standard or order of the United States related to commercial motor vehicle safety or health; or,

(ii) the employee has a reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition.

49 U.S.C. §31105.

1. *PRIMA FACIE* CASE

To establish a *prima facie* case of discriminatory treatment under the STAA, Mr. Feltner must prove: (1) that he was engaged in an activity protected under the STAA; and (2) that he was the subject of adverse employment action; and (3) that a causal link exists between his protected activity and the adverse action of his employer. Moon v. Transport Drivers, Inc., 836 F.2d 226, 229 (6th Cir. 1987). The establishment of the *prima facie* case creates an inference that the protected activity was the likely reason for the adverse action. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). At a minimum, Mr. Feltner must present evidence sufficient

to raise an inference of causation. Carroll v. J.B. Hunt Transportation, 91-STA-17 (Sec'y June 23, 1992).

A. Protected Activity

i. Section 405(a)(1)(A)

Mr. Feltner has alleged that he was fired as a result to his phone call to OSHA. Under subsection (a)(1)(A) of Section 405, protected activity may be the result of complaints or actions with agencies of federal or state governments, or it may be the result of purely internal activities, such as internal complaints to management. Reed v. National Minerals Corp., 91-STA-34 (Sec'y Decision, July 24, 1992).

To establish protected activity, the employee need demonstrate only a reasonably perceived violation of the underlying statute or its violations. This is to say, that although the employee need not prove an actual safety violation, the complaints must be made in good faith. See Ashcraft v. Univ. of Cincinnati, No. 83-ERA-7, slip op. at 9 (July 1, 1983).

The issue ultimately lies with whether or not Mr. Feltner reasonably believed that his truck was being overloaded. Under Section 405(a)(1)(A), the employee need not prove an actual violation of the underlying statute. See Yellow Freight System, Inc. v. Martin, 954 F.2d 353, 357 (6th Cir. 1992). Rather, an employee's complaint must be "grounded in conditions constituting reasonably perceived violations" of the underlying Act. Johnson v. Old Dominion Security, 86-CAA-3 to 5 (Sec'y May 29, 1991). If Mr. Feltner reasonably perceived that the Respondents were in violation of the Act, that he may have other motives for engaging in protected activity is irrelevant. Carter v. Electrical District No. 2 of Pinal County, 92 TSC 11 (Sec'y, July 26, 1995).

Mr. Feltner testified that he felt that his truck was overloaded because he could feel it sway. He made no attempt to weigh his truck to determine whether the truck was in fact overloaded. In contrast to Mr. Feltner's testimony, Mr. Moore testified that he loaded approximately twelve tons, the equivalent of four full or five partial buckets into the truck. Mr. Feltner's truck could legally hold fifteen tons. Additionally, Mr. Miniard testified that he personally looked at the trucks at the site and that they all appeared within reason. He also talked to the other drivers who told him that they did not feel overloaded. For these reasons, I question whether Mr. Feltner's belief that he was overloaded was reasonable.

I also question whether this complaint was made in good faith. Mr. Feltner testified that he felt that his truck was overloaded on August 12, 2002, but "just let it go, because [he] didn't have [his] tape recorder that day." If Mr. Feltner truly believed that his truck was overloaded and that this condition caused a safety hazard, it raises questions as to why he would not confront the issue on the August 12th. It appears that Mr. Feltner complained of overloading, once his tape recorder was present, not in the hopes that the situation would be resolved swiftly on the job site, but in anticipation of a possible claim.

Mr. Miniard testified that when a driver complains that he feels his truck is overloaded, he normally suggests to the employees to weigh the truck and turn it in with the bills. On August 13, 2002, he made this same suggestion to Mr. Feltner, however Mr. Feltner declined to do. I find this suspect. If the complaint was made in good faith, it seems reasonable for Mr. Feltner to have his truck weighed. Additionally, weighing the truck would be of no expense to him. Instead Mr. Feltner relied on his own subjective belief. He failed to provide any outside testimony or documentation supporting his complaint.

Based on these reasons and my observation of Mr. Feltner at trial, I find his reasonable belief and good faith in making the claim unsupported by the record.

ii. Section 405 (a)(1)(B)

Although no party has argued the application of Section 405(a)(1)(B), I find that analysis of the facts under this subsection is appropriate.

On August 13, 2002, Mr. Feltner worked approximately three-fourths of the day. He then went to Tony Donofrio in order to get his ticket signed. Mr. Donofrio requested that Mr. Feltner go to the gravel pit and take another load of gravel. Mr. Feltner refused, allegedly on the basis that his tailgate still leaked and could only be closed by using a backhoe. Mr. Donofrio then signed his ticket. Mr. Feltner asked multiple times whether he was fired and Mr. Donofrio stated he had no authority to terminate him.

Section 405(a)(1)(B) is designed to protect employees who refuse to operate a vehicle because such operation violates law or because the employee has a reasonable apprehension of serious injury to the employee or the public because of the unsafe condition. Mr. Feltner stated that he did not want to drive with his misaligned tailgate because "if they get me for an unsecured load and then I got to pay for all these windshields I bust up."

Although this concern appears to be more economically driven, if Mr. Feltner was concerned about breaking windshields then there likely is a safety concern as well. However, I do not believe that his refusal to work was due to his concern over his tailgate leaking. First, Mr. Feltner had worked the majority of the day hauling materials with the tailgate broken. Secondly, Mr. Feltner testified that the tailgate could be pushed closed and that the tailgate would seal once closed. Additionally, Mr. Feltner continued to work for ten to fourteen days before having the tailgate fixed. Lastly, Mr. Mike Greer testified that tailgates often are misaligned and that such defects on a truck are common.

Mr. Feltner also described his safety concern in regard to driving his truck overloaded. He testified that he would drive for a half a mile on a public road and that he was afraid that "them black boys would shoot me if one of them dirt clods hit them." When asked about other safety concerns, Mr. Feltner stated, "That was my only concern. Long as them black boys leave me alone, I was fine."

I find this safety concern to be unreasonable. Mr. Feltner presents no evidence that he was ever the target of violence based on dirt clods falling off his vehicle. Subsection (a)(2) specifically states that an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances would conclude that the unsafe condition establishes a real danger of accident, injury or serious impairment to health. No reasonable individual would view driving on a public road for half a mile as a real danger of injury due to potential shooting. I find Mr. Feltner's statements to be not only unreasonable, but truly preposterous.

As I have found Mr. Feltner's safety concerns unreasonable and incredible, I find that he is not protected under §405(a)(B).

B. Adverse Action

Mr. Feltner contends that he was subjected to adverse action by both Mainline and Century. According to the testimony of Mr. Feltner, Mr. Feltner told Mr. Cochran that he would call OSHA if he was overloaded again. Mr. Cochran then reported this conversation to Mr. Moore, who approached the Complainant and allegedly told him that he "might want to load me and I'm fired for thinking about calling OSHA." (TR 74) Mr. Feltner testified that Mr. Donofrio, the foreman for Mainline, then approached him and told him that he could work that day but would not be working for Mainline any longer. Mr. Feltner then called OSHA to file his complaint. Mr.

Feltner also contends that later that afternoon he met with Mr. Miniard. "He [Miniard] asked me why I called OSHA that day. I said, well they was overloading my truck and I just told them not to overload me, so I called OSHA. I asked him was I going back on the job the next day and he said no." (TR 78) The Complainant did not ask about other work other than on the Mainline site and he did not call the next day about jobs. (TR 82)

Mr. Feltner claims he went back to Mr. Donofrio to have him sign his tickets. Mr. Donofrio then asked Mr. Feltner if he would haul another load of gravel. Mr. Feltner refused purportedly because his tailgate leaked.

Mr. Feltner testified that he called Jim Miniard on the night of August 13, 2002. He testified, "I said, Jimmy, where does me and you stand, we still good or are you going to go with Mainline. He said don't call me no more and hung the phone up. So I knew right then that there wasn't no work." (TR 82) Upon questioning, Mr. Feltner admitted that he was only told that he would not be working that specific job and that he did not call the next day as was customary to ask for work at other sites. (TR 97)

Mr. Feltner's testimony is disputed by several of the witnesses. Mr. Moore testified that he confronted the Complainant after being told by Mr. Cochran that the Complainant was upset. Mr. Moore testified that he said "I hear you have a problem with me." According to Mr. Moore, Mr. Feltner responded that he "had already called OSHA and if one more spec of dirt fell in that road when he went and dumped it, that he was to call them and they would be right back out there." (TR 17) Mr. Moore then told the Complainant that he would not load him and work under the stress that he was creating. Mr. Moore testified that he also called Mr. Donofrio and informed him of the situation. Mr. Moore denied ever stating that the Complainant was or would be fired, only that he would not load the Complainant. Moreover, there is no evidence that Mr. Moore was acting in any supervisory capacity with the inherent authority to hire or fire employees or to effectively recommend any adverse action against the Complainant.

Mr. Feltner has also alleged that he was blacklisted from similar employment in Dayton. Specifically, he alleged that he went to JP Martin Trucking and the owner told him that no one would want to work with him since he called OSHA. Additionally, Mike Greer of Associated Excavating testified that his mother, who worked in the office, was contacted by Century and informed that Mr. Feltner was not working for Century because of a problem with OSHA and Mainline. Ms. Miniard, owner of Century, testified that she did call Associates, but only to inform them that Mr. Feltner

was no longer covered by her insurance. She denied telling them not to work Mr. Feltner because he called OSHA. Additionally, she states that she talked to Mr. Greer's father, not his mother.

i. Discharge

Although neither Respondent told the Complainant that he was discharged from his employment, the Respondents' actions may still constitute adverse action if the employee could reasonably infer that there would not be further work for him. In Jackson v. Protein Express, 95-STA-38 (ARB Jan. 9, 1997), the Board held that

When no clear statements have been made by management establishing an employee's status, [t]he test of whether an employee has been discharged depends on the reasonable inferences that the employee could draw from the statements or conduct of the employer. Pennypower Shopping News, Inc. v. N.L.R.B., 726 F.2d 626, 629 (10th Cir. 1984) (emphasis in original).

The question, therefore, is whether it was reasonable for Mr. Feltner to believe that he was discharged. First, Mr. Feltner alleges that Mr. Moore told him that he was fired for thinking about calling OSHA. Mr. Moore denied making this statement, and as noted, I find Mr. Moore to be more credible than Mr. Feltner. Moreover, Mr. Moore's position was that of a loading operator for Mainline. Even if Mr. Moore did say that he was fired, Mr. Feltner would not have a reasonable basis for believing that he was discharged since Mr. Moore was only a fellow employee and did not work in any management capacity with supervisory authority.

As another basis for his belief, Mr. Feltner asserts that on the afternoon of August 13th, 2002, he asked Mr. Miniard if he would be "back on the job" the next day and that Mr. Miniard said "no." Mr. Miniard testified that Mr. Feltner complained of his truck being overloaded, but stated that Mr. Feltner did not tell him that he had called OSHA. Mr. Feltner also testified that he called Mr. Miniard that evening and that Mr. Miniard told him not to call anymore and hung up the phone. Again, I note that Mr. Feltner's testimony is contradicted by the testimony of Mr. Miniard. I find Mr. Miniard to be more credible. Additionally, Mr. Miniard was only a fellow employee who worked as an estimator. He was married to the owner, yet no evidence has been provided which would show that Mr. Miniard had the authority to fire the Complainant. As such, even if I found Mr. Feltner's testimony credible, which I do not, I find that a reasonable person in his position would not construe such a statement as a discharge since Mr. Miniard had no apparent authority to discharge employees.

Mr. Feltner did not work for Century again after August 13, 2002. However, I find that this was a result of his own abandonment, not adverse action against him. Both Ms. Miniard and Mr. Feltner testified that it was the workers' responsibility to call Century between 3:00 to 5:00 p.m. in order to be scheduled for the next day's work. It is undisputed that Mr. Feltner did not call in to get a job assignment. As such, I find that the cessation of Mr. Feltner's employment was a result of his own voluntary abandonment, not an adverse action by Century Trucking.

It is undisputed that Mr. Donofrio called Ms. Miniard and told her that Mr. Feltner was having a problem with Mainline and that he would prefer if he was not sent back to the McGee project. However, Mr. Donofrio contends that he did not terminate Mr. Feltner as he had no authority to do so. In fact, when Mr. Feltner asked multiple times if he was fired, Mr. Donofrio repeated "No, I can't fire you, you don't work for me." Despite his express language to the contrary, I find that Mr. Donofrio's request that the Complainant not be assigned to the project constitutes adverse action. Such action, in essence, terminated Mr. Feltner's employment for Mainline.

ii. Blacklisting

Mr. Feltner alleges that he was blacklisted by Century Trucking.² He claims that he has not been able to work because employers tell him they don't want him on the job because he called OSHA.

In order to establish a claim of blacklisting, there must be evidence that the Respondent had intentionally interfered with any employment opportunity that the Complainant may have had available. Fraday v. Tennessee Valley Authority, 92-ERA 19 and 34 (Sec'y Oct. 23, 1995).

The only evidence presented by Mr. Feltner is his own testimony and that of Mr. Greer. There is disputing testimony by Ms. Miniard. As noted, I find Mr. Feltner's testimony lacking credibility. Additionally, Mr. Greer, though credible, testified to a conversation between his mother and Century. He admitted that he has no personal knowledge as to the conversation. Ms. Miniard testified that she called Associates but that she talked to Mr.

²At the hearing, Mr. Feltner repeatedly alleges that he is being "blackmailed" by the Respondents. Based on the facts given, it appears that he believes he has been "blacklisted", rather than blackmailed.

Greer's father and did so only to tell them that Mr. Feltner was off of her insurance. Since Ms. Miniard was personally involved in the conversation, I rely on her testimony.

Mr. Feltner also stated that he was told by JP Martin Trucking that he had a bad reputation around Dayton and would not be hired. No one from JP Martin testified as to Mr. Feltner's reputation. Additionally, there was no testimony that the Respondents were intentionally interfering with the Complainant's ability to find work. As the evidence fails to support Mr. Feltner's allegation of blacklisting, I find that the Respondents did not participate in this form of adverse action.

C. Causal Connection

Lastly, in order to establish a *prima facie* case of discriminatory treatment, the Complainant must prove that a causal connection exists between his protected activity and the adverse action of his employer.

Assuming that the Complainant has established that he was engaged in protected activity and subject to adverse employment action, I find that the Complainant has established the requisite causal nexus.

A causal connection between the protected activity and the adverse employment action may be established by showing that the employer was aware of the protected activity and that adverse action closely followed thereafter. See County v. Dole, 886 F.2d 147, 148 (8th Cir. 1989); Mitchell v. Baldridge, 759 F.2d 80, 86 (D.C. Cir. 1985); Burrus v. United Telephone Company of Kansas, Inc., 683 F.2d 339, 343 (10th Cir.) cert. denied, 459 U.S. 1071 (1982).

Both Respondents were made aware of Mr. Feltner's phone call to OSHA. Any alleged adverse action occurred either on the day at issue or shortly thereafter. Accordingly, I find that such temporal proximity is sufficient to establish the necessary causal link between the protected activity and the adverse action.

2. REBUTTING THE *PRIMA FACIE* CASE

Assuming that the *prima facie* case can be established, the burden of production shifts to the Respondents to present evidence sufficient to rebut the inference of discrimination. To rebut this inference, the employer must articulate a legitimate, nondiscriminatory reason for its employment decision. Id. A credibility assessment of the non-discriminatory reason espoused by

the employer is not appropriate; rather, the Respondent must simply present evidence of any legitimate reason for the adverse employment action taken against the Complainant. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

If the employer successfully presents evidence of a non-discriminatory reason for the adverse employment action, the employee must then prove, by a preponderance of the evidence, that the legitimate reason proffered by the employer is a mere pretext for discrimination. Moon, supra; See also Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). In proving that the asserted reason is pretextual, the employee must do more than simply show that the proffered reason was not the true reason for the adverse employment action. The employee must prove both that the asserted reason is false and that discrimination was the true reason for the adverse action. Hicks, supra, at 2752-56.

Mainline Trucking contends that they did not want Mr. Feltner at the job site because he was being argumentative and not getting along with other workers. Mr. Moore, a fellow employee, refused to load the Complainant because of the stress that Mr. Feltner was creating. I find that this constitutes a legitimate, nondiscriminatory reason for requesting that Mr. Feltner not be sent back to the site. The testimony shows that Mr. Feltner sat in his truck, refused to be loaded, and refused to talk to Ms. Miniard. Mr. Feltner stated that he had called OSHA before he actually did. Furthermore, Mr. Feltner did not complain about the overloading until he had a tape recorder with him. I find this behavior to be argumentative, confrontational and manipulative. Mr. Donofrio was placed in a situation where his loader refused to load one of his drivers. In order to continue the job without further incidents, Mr. Donofrio made the decision to request that Mr. Feltner not be sent to the McGee site. I find this decision to be legitimate and non-discriminatory.

Additionally, I find that Century Trucking has proffered a legitimate non-discriminatory reason for their actions. Century Trucking received the phone call from Mainline stating that Mainline would prefer if Mr. Feltner not be sent back to the site again. Ms. Miniard testified that she did not send him back to the site again. As noted, Mr. Feltner never called Century Trucking for another assignment and accordingly I have found no adverse action on behalf of Century Trucking. However, even if this did constitute adverse action, I find a legitimate non-discriminatory reason sufficient to rebut the *prima facie* case. Ms. Miniard merely arranges for drivers to work for subcontractors on different sites. If the subcontractor in charge of the job has requested that he not work with an employee because he finds him

argumentative, it is only reasonable not to send the employee back. Mr. Feltner's own argumentative nature justifies any alleged adverse action, independent of any complaints made to OSHA.

The Respondents have articulated legitimate reasons for actions against the Complainant. Accordingly, it is the Complainant's burden to prove, by a preponderance of the evidence, that the legitimate reason proffered by the respondent is a pretext for discrimination. Such pretext can be established by showing that the respondents' actions were actually based on a discriminatory motive and that the proffered explanation is not worthy of credence. The proof must go beyond disbelief of the respondent - the fact finder must believe the complainant's explanation of intentional discrimination. Further, the respondent's explanation may be pretextual, but nonetheless found to be a pretext for actions other than prohibited discrimination.

Mr. Feltner has not provided any evidence to establish that the legitimate reasons proffered are mere pretexts. He has only set forth his own testimony stating that the Respondents' actions were discriminatory because of his alleged protected activity. As noted, I find his testimony lacking credibility. Plus, such testimony does not show why the Respondents' proffered explanations are not worthy of credence.

Accordingly, I find that the Complainant has failed to establish, by a preponderance of the evidence, that the reasons articulated by the Respondents for any adverse employment action are mere pretexts for discrimination.

Conclusion:

In summation, I find no evidence to indicate that any alleged adverse actions taken by the Respondents were in any way motivated by the Complainant having engaged in alleged protected activity. As the Complainant has failed to establish that the actions against him were motivated by any prohibited reasons, his claims must be denied.

RECOMMENDED ORDER

IT IS RECOMMENDED that the complaints of Charles Feltner for relief under the Act be DENIED.

A

DANIEL J. ROKETENETZ
Administrative Law Judge

NOTICE

This Recommended Decision and Order and the administrative file in this matter will be forwarded for final decision to the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., N.W., Washington, D.C. 20210. See 61 Fed. Reg. 19978 and 19982 (1996).